

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 28, 2007 Session

SANDRA JONES, next of kin of LARRY C. JONES, v. RONNIE SMITH

**Direct Appeal from the Circuit Court for Smith County
No. 5697 Hon. John Wootten, Circuit Judge**

No. M2006-01724-COA-R3-CV - Filed September 19, 2007

A wrongful death action pursuant to the Governmental Tort Liability Act against a deputy sheriff who shot decedent after a traffic accident, was dismissed by the Trial Court at the conclusion of the plaintiff's proof. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Phillip L. Davidson, Nashville, Tennessee, for appellant.

John D. Kitch, Nashville, Tennessee, for appellee.

OPINION

In this wrongful death action, the plaintiff filed a Complaint, pursuant to the Governmental Tort Liability Act, and alleged that the deceased was killed by Ronnie Smith, a deputy sheriff employed by Smith County. The Complaint alleged that Smith owed a duty to the deceased not to use more force than was necessary to apprehend him, and that Smith's force was excessive and resulted in the wrongful death of the deceased.

Defendants, Smith County and Ronnie Smith, answered, denying that excessive force was used, and pled the affirmative defenses of failure to state a claim, self-defense, immunity, etc.

Subsequently, the parties entered an Agreed Order, agreeing that Ronnie Smith was a proper party defendant and dismissed Smith County as a defendant.

The trial was held on July 11, 2006, and plaintiff called Ronnie Smith as the first witness. Smith testified that it was Smith County policy to make every effort to minimize the risk of harm to innocent persons when the use of deadly force was necessary to defend the officers or others from death or serious bodily harm. He testified that on the date in question he was carrying a .40 caliber Glock that was not department issued, but that he had authorization to carry that weapon.

Smith testified that he was on routine patrol duty that day, and received a call to go to the scene of an accident. Smith testified that when he arrived at the scene, there was a van in a yard off the highway, and 3 or 4 people were standing outside the van. Further, that he went to the driver's side of the van, and tried to talk to the decedent by asking if he was ok, but received no response. He said that when the decedent finally turned to look at him, he could see that he was sweating profusely and his pupils were extremely dilated. He then instructed the driver to step out of the van so he could make sure that he was all right, but he then heard the ignition click, and realized the decedent had grabbed the keys. Smith testified that he grabbed the door handle, as decedent started the van, and grabbed decedent's arm, but decedent pushed him away, and the van started moving toward his patrol car. He said the van then stopped and started coming "back my way just wide open, backing up." He testified that a Ms. North was close to him and he pushed her one way while he went the other, and the van went right between them. He testified that when the van started moving, the other people on the scene scattered, and that after the van backed up he ran to his patrol car to radio for backup and he was halfway in and halfway out of the car trying to reach the radio when he heard the van and looked up in time to see the van ram into the passenger side of his patrol car, knocking him over into the car. He testified that he started shooting at the van when he thought it was backing up to ram him again, and that he did not have any other options because he was the only officer at the scene. He testified that the van ultimately came to rest in a ditch.

Smith testified that he was standing at the front of his patrol car when he fired the first shot, and he was simply trying to disable the van, but could not explain why the diagram showing the shell casings did not show any near the front of his patrol car. He testified that he then moved around the patrol car and continued to fire at the tires and the engine of the van, and that he was in fear for his life and the lives of others after the decedent tried to run over him and Ms. North. He testified that when he was positioned in front of the van, he told the decedent to stop and get out, but the decedent then started coming towards him again, and that was when he fired the shots into the front of the van. Photographs were introduced showing damage to the patrol car. Smith testified that the front fender of the car showed damage, as well as the rear quarter panel, but the passenger door did not. He testified that he felt the decedent must have hit him twice.

Other witnesses testified, some corroborating part of Smith's testimony, and some contradicting some of Smith's details.

At the conclusion of plaintiff's proof, defendant moved for an involuntary dismissal, and the Judge stated that he had to view the evidence in the light most favorable to plaintiff, and that in doing so, he concluded the deputy did all that he could reasonably do. The Judge stated that he had impartially weighed and evaluated the evidence, had applied the law to the facts, and found that the plaintiff had failed to make out her case by a preponderance of the evidence.

Plaintiff's appeal raises the issues of whether the evidence preponderated against the findings that Jones had assaulted Smith, and was the force used by Smith excessive?

The standard of review of a Motion to Dismiss is set forth in *Thompson v. Hensley*, 136 S.W.3d 925, 929 (Tenn. Ct. App. 2003):

When a motion to dismiss is made at the close of a plaintiff's proof in a non-jury case, the trial court must impartially weigh the evidence as though it were making findings of fact and conclusions of law after presentation of all of the evidence. See Tenn. R. Civ. P. 41.02(2). If a plaintiff's case has not been established by a preponderance of the evidence, then the case should be dismissed if, on the facts found and the applicable law, the plaintiff has shown no right to relief. See *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977); *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991). The standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is in accordance with Tenn. R. App. P. 13(d). *Atkins*, 823 S.W.2d at 552. As such, the factual findings of a trial court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure de novo standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We have explained that in such a situation, "[w]e will affirm the trial court's decision unless the evidence preponderates against the trial court's factual determinations or unless the trial court has committed an error of law affecting the outcome of the case. We give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Burton v. Warren Farmers Co-op.*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002).

Initially, the plaintiff argues that the evidence preponderates against Smith's claim that decedent assaulted him, and argues that the evidence, (i.e., witness statements taken by the TBI) does not corroborate Smith's testimony about decedent backing up towards him and Ms. North in

the van, or about decedent's intentionally hitting the patrol car, etc. A review of the evidence demonstrates that Smith's testimony at trial and deposition, and his written statement made the day of the incident, were consistent, as well as consistent with statements made by eyewitnesses. While there are minor discrepancies in the way witnesses perceive stressful situations, the eyewitness statements do not materially controvert anything testified to by Smith, but support his claims that the van was coming toward him and others, and the witnesses ran from the van's path.

The material facts are essentially undisputed, that decedent was behaving erratically, refused to get out of the van when requested, started the van and drove it toward Smith and others, and ran into Smith's patrol car.

Plaintiff was required to establish that defendant breached the duty of reasonable care to decedent, and that Smith breached this duty by using excessive force against the decedent. Plaintiff cites civil rights cases dealing with the use of excessive force, e.g., *Tennessee v. Garner*, 105 S. Ct. 1694 (1985), and *Thompson v. Williamson County*, 965 F. Supp. 1026 (M. D. Tenn. 1997). These cases teach that excessive force claims are to be analyzed pursuant to an "objectively reasonable" test, which requires the court to balance the individual's rights against governmental interests, and to consider such factors as the severity of the crime, whether the suspect poses an immediate threat to officers or others, and whether the suspect is actively resisting or attempting to evade arrest. *Id.*¹

The evidence in this case demonstrates that Smith acted reasonably under the circumstances he encountered, i.e. where decedent was threatening the life of Smith and others by driving his van in an erratic and threatening manner. See, *West v. East Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 550-551 (Tenn. 2005). Smith testified that when the van accelerated towards him, he felt his life was in danger and that he had no choice but to fire shots into the cab of the van, and that he continued to fire at the tires of the van as the van passed him, but stopped firing when the van stopped.

The Trial Court found that Smith "did all he could do" in this situation, and that he only resorted to deadly force when the decedent (for possibly the fourth time) accelerated his van toward Smith, using it as a lethal weapon. In accordance with the foregoing civil rights cases, the evidence establishes that decedent clearly posed an immediate threat to the officer and others, and was actively resisting and/or attempting to evade arrest. As stated by our Supreme Court in *West*, "[r]easonable care is to be determined by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury." In this case, the evidence established that Smith only used such force as was necessary to protect his own life and the lives of

¹ As defendant points out, courts have recognized that this analysis must be performed from the perspective of a reasonable officer on the scene, and must account for the fact that officers must make split-second decisions about the amount of force needed when they are confronted with a possible life-threatening situation. *Graham v. Connor*, 109 S. Ct. 1865 (1989); *Smith v. Freland*, 954 F. 2d 343 (6th Cir. 1992).

others, when confronted with the dangers at hand.

We find the Trial Court properly held that plaintiff failed to establish that Smith acted unreasonably or breached a duty to decedent.

The Judgment of the Trial Court is affirmed, and the cost of the appeal is assessed to the plaintiff, Sandra Jones.

HERSCHEL PICKENS FRANKS, P.J.